IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. SENTINEL MANAGEMENT GROUP, INC., ERIC A. BLOOM, and CHARLES K. MOSLEY, Defendants.	)	Case No. 08 C 2410 Hon. Charles P. Kocoras Jury Demanded

ERIC BLOOM'S RESPONSE TO PLAINTIFF'S RULE 59(e) MOTION
FOR RECONSIDERATION AND TO ALTER OR AMEND JUDGMENT

Defendant Eric A. Bloom ("Bloom"), through his attorneys, THEODORE T. POULOS and TERENCE H. CAMPBELL of COTSIRILOS, TIGHE, STREICKER, POULOUS & CAMPBELL, and MATTHEW S. RYAN, submits the following Response to the Commodity Futures Trading Commission's ("CFTC" or "Commission") Rule 59(e) Motion for Reconsideration and to Alter or Amend this Court's Judgment in favor of Eric Bloom.

I. INTRODUCTION

On April 28, 2012, the CFTC filed a motion asking the Court to reconsider its decision granting Bloom summary judgment on Counts I and III, claiming the Court made a "manifest error of law" (CFTC Memo. at 2) with respect to the Court's conclusion that the alleged conduct did not involve "customer funds" or transactions "in connection with" futures contracts as required by the CEA.

The CFTC's motion, however, is entirely inappropriate under Fed.R.Civ.P. 59(e) because it merely seeks to relitigate whether the funds at issue were "customer funds" and whether Sentinel committed a fraud "in connection with" futures transactions. The CFTC points to no controlling change in the law or in the facts. *BP Amoco Chem. V. Flint Hill Res., LLC.*, 498 F.Supp.2d 853, 856 (N.D. Ill. 2007)(discussing appropriate bases for motion for reconsideration). It also does not explain how the Court purportedly misapprehended the issues or the CFTC's position (*id.*), and there is certainly no claim that the Court decided an issue outside the adversarial issues presented. *Id.* Rather, the CFTC simply disagrees with the Court's decision, rendered after full briefing of the issues by both sides. Displeasure with the Court's ruling, however, is not a proper basis for a motion to reconsider under Rule 59(e). *Id.*

Substantively, the CFTC's arguments fare no better. First, the CFTC's argument again relies on a faulty factual premise that this Court explicitly rejected – namely, that the funds Sentinel's client FCMs invested with Sentinel through accounts at BONY were "customer funds" as defined by the CEA. Clearly, they were not, and the Court so found. (*See*, *e.g.*, Mem. Opin. and Order at 17-18 ("Sentinel never received any customer funds" as defined in 17 C.F.R. Sec. 1.3(gg) and Sec. 4(d)(a) of the CEA.). The funds in question were, by definition, over and above what the FCMs' customers needed on deposit to margin, guarantee, or secure futures contracts. Accordingly, as the CFTC's own expert, Dennis Dutterer ("Dutterer") specifically testified – and as this Court correctly found – those funds did not meet the definition of "customer funds" under the CEA. The Court can hardly be said to have committed a "manifest error of law" for having accepted as true the sworn testimony of the CFTC's hand-picked expert which, among other things, constitutes an admission of a party opponent. *See Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980) ("[i]n giving his deposition [the expert] was performing the function that [defendant] had employed him to perform. His deposition, therefore, was an admission of [defendant's]" and was admissible as such under Fed.R.Evid. 801(d)(2)); *Dean v. Watson*, 1996 WL 88861, at *3-*6 (N.D. Ill. 1996); *In re Chicago Flood Litig.*, 1995 WL 437501, at *11 (N.D. Ill. 1995) ("A party's pleadings and expert reports often constitute party admissions pursuant to Fed.R.Evid. 801(d)(2). Evidence that plaintiffs or their experts themselves agree with aspects of the [defendant's] case is strongly probative.") (internal citations omitted). Absent misuse of "customer funds" as defined under the CEA, Counts I and III cannot stand.

Similarly, the CFTC cannot demonstrate as a matter of either fact or law that any of Sentinel's alleged conduct occurred "in connection with" a futures transaction as required under the CEA. As the Court held, it is undisputed that Sentinel never engaged in futures trading and that none of Sentinel's investments involved futures contracts. In a futile attempt to resuscitate its moribund claim that Sentinel's alleged conduct was "in connection with" futures transactions, the CFTC asserts that the third-party customers of Sentinel's FCM investors would not have been able to trade futures without access to the funds invested with Sentinel. (CFTC Mem. at 15). Not true.

As the Court found, and as the CFTC's expert admitted, the monies Sentinel received from its FCM investors were excess margin funds that were expressly ***not*** needed or used to "margin, guarantee, or secure any futures trades." (Opin. at 17). Moreover, the Court explicitly addressed much of the authority now regurgitated by the CFTC in its motion for reconsideration and rejected its application to the undisputed facts of this case. In short, the CFTC cannot prove conduct by Bloom – much less a fraud – "in connection with" futures transactions, and summary judgment in favor of Bloom on Count I was proper for this additional reason, as well.

Even if the CFTC were somehow able to convince the Court that Sentinel's investor FCMs deposited "customer funds" under the CEA with BONY, Bloom would still be entitled to summary judgment on Counts I and III because those counts require the CFTC to prove that Sentinel, with Bloom's culpable participation, improperly pledged those customer funds (*i.e.* Seg 1 securities) for the BONY loan for Sentinel's benefit. (Dckt. #1).[1] There is absolutely no evidence that Sentinel pledged Seg 1 securities as collateral for the BONY loan for *Sentinel's* benefit, as opposed to pledging securities for the BONY loan as part of a leveraged trading strategy for the benefit of *Sentinel's FCM investors*. In its summary judgment briefs on this issue, the CFTC relied exclusively on two things: an affidavit from Lisa Marlow and CFTC Exhibit 16 – which consisted of a "series of notes which set forth the conclusions of an auditor or investigator that examined Sentinel over a span of five days" submitted with no foundation (Opinion at 9) – to support its claim that customer funds were improperly pledged for Sentinel's benefit. ***But the Court struck both of those exhibits***, finding that (a) the Marlow Affidavit was an improper, undisclosed expert report (Opinion at 6-8), and (b) there was no proper foundation for the notes constituting Exhibit 16. (Opinion at 9). Notably, the CFTC does not challenge the Court's rulings in striking either the Marlow Affidavit or Exhibit 16. Accordingly, the CFTC is left with exactly zero admissible evidence to prove an essential factual predicate to Counts I and III.

[1] References to the docket for this matter are cited as (Dckt. #__).

Finally, "[t]o establish Bloom's liability under Section 13(b) [on which Counts I and III depend], the CFTC must prove that Bloom had general control over Sentinel's operation and either knowingly induced Sentinel's primary violation of the CEA or failed to act in good faith." (Opinion at 11, citing *Monieson v. CFTC*, 996 F.2d 852, 859-60 (7th Cir. 1993)). Even if this Court found that Sentinel's investor FCMs deposited "customer funds" at BONY, there is no evidence that Sentinel ever misappropriated those funds (*i.e.* no evidence of a "primary violation" by Sentinel), much less that Eric Bloom knowingly induced any misappropriation or otherwise acted in bad faith. These failures also, and independently, require summary judgment in favor of Bloom on Counts I and III.

For all these reasons, the Court should deny the CFTC's motion for reconsideration.

II. ARGUMENT

A. The CFTC's Motion Does Not Satisfy the Criteria Necessary for the Court to Alter or Amend Judgment Under Rule 59(e).

1. Legal Standards.

"Disposition of a motion for reconsideration is left to the discretion of the district court, and its ruling will not be reversed absent an abuse of discretion." *Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F. 3d 1264, 1270 (7th Cir. 1996). "The Seventh Circuit has said that a motion to reconsider is appropriate where (1) the court has patently misunderstood a party; (2) the court has made a decision outside the adversarial issues presented to the court by the parties; (3) the court has made an error not of reasoning but of apprehension; (4) there has been a controlling or significant change in law since the submission of the issue to the court; or (5) there has been a controlling or significant change in the facts since the submission of the issue to the court." *BP Amoco*

Chem., 489 F.Supp.2d at 856. None of these criteria is present in this case, nor does the CFTC couch its argument in these terms. Rather, the CFTC argues that the Court's judgment in favor of Eric Bloom on Counts I and III should be reversed and judgment entered in favor of the CFTC because, the CFTC contends, the Court committed a "manifest error of law."

2. The Court Did Not Commit a Manifest Error of Law.

As defined by the Seventh Circuit, "[a] 'manifest error' is not demonstrated by the disappointment of the losing party. It is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000), quoting *Sedrak v. Callahan*, 987 F. Supp. 1063, 1069 (N.D. Ill. 1997). While the CFTC correctly sets forth these standards in its brief, it comes nowhere near satisfying them. Without citing any newly available authority and instead simply rehashing arguments it made on summary judgment, the CFTC argues that the Court misinterpreted the definitions of "customer funds" for the purposes of Section 4d(b) and the "in connection with" a futures transaction requirement under Section 4b. Like the movant in *Oto*, the CFTC merely "took umbrage with the court's ruling and rehashed old arguments." *Id.* at 606. This is not a proper basis for a motion for reconsideration.

3. The Court Should Not Consider the CFTC's Improper Reliance on Authority Previously Available But Not Proffered at Summary Judgment.

In support of its Motion for Reconsideration, the CFTC cites a variety of previously un-cited, non-binding authority, ranging from House Committee hearing testimony from 1967, to the Commission's Letter Interpretations, administrative decisions, and reported cases – all of which were available to the CFTC during the pendency of the summary judgment motions. The Court should not consider any of the CFTC's newly cited legal authority on a motion to reconsider.[2]

"On any issue in a summary judgment motion, as on any issue at trial, each party is entitled to one bite at the apple." *Refrigeration Sales Co. Inc. v. Mitchell-Jackson, Inc.*, 605 F. Supp. 6, 9 (N.D. Ill. 1983). In this case, as in *Refrigeration Sales,* the CFTC's motion for reconsideration simply seeks to re-litigate the issues already decided on summary judgment and therefore should be denied. As the court held in *Quaker Alloy Casting Co. v. Gulfco Inds., Inc.*:

> [T]his Court's opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure. Motions such as this reflect a fundamental misunderstanding of the limited appropriateness of motions for reconsideration.

123 F.R.D. 282, 288 (N.D. Ill. 1988).

Here, as in *Ho v. Taflove,* the CFTC seeks to "improperly add new arguments and authority [] not included with their original summary judgment arguments." 696 F.Supp.2d 950, 961-62 (N.D. Ill. 2010). The *Ho* court did not consider the new arguments and authority, holding that if the plaintiffs "believed them to be relevant and instructive, they should have submitted them on summary judgment." *Id.* Thus, when the Plaintiff simply disagrees with the Court's view of the legal authority, denial of the motion for reconsideration is appropriate. *Id.* Such is the case here, and the CFTC's motion should be denied.

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[2] In any event, the "new" authority is not on point, readily distinguishable based on the facts of this case, and adds nothing new to the Court's analysis.

4. The Court Should Not Consider Any of the CFTC's New Factual Arguments.

Further, the Court should not consider any of the CFTC's new (and baseless) factual assertions. In its Memorandum in Support of its Motion for Reconsideration, the CFTC foretells dire factual consequences if the Court upholds its judgment in favor of Bloom on Counts I and III. (CFTC Memo at 8-11). Not surprisingly, the CFTC does not cite to a single fact in the record to support its hyperbolic, hypothetical doomsday scenario because no such evidence in the record exists. The introduction of new evidence on a motion for reconsideration of summary judgment is prohibited. *Oto,* 224 F.3d at 606. ("A party may not use a motion for reconsideration to introduce new evidence that could have been presented earlier.")

Indeed, as the Seventh Circuit has held: "[a] party seeking to defeat a motion for summary judgment is required to 'wheel out all its artillery to defeat it.' Belated factual or legal attacks are viewed with great suspicion, and intentionally withholding essential facts for later use on reconsideration is flatly prohibited." *Caisse Nationale de Credit Agricole,* 90 F.3d at 1270, quoting *Employers Ins. Of Wausau v. Bodi-Wachs Aviation Ins. Agency,* 846 F.Supp. 677, 685 (N.D. Ill. 1994) and *Ryan v. Chromalloy Am. Corp.,* 877 F.2d 598, 603-604 (7th Cir. 1989)). Moreover, a motion for reconsideration "cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the summary judgment motion. To support a motion for reconsideration based on newly discovered evidence, the moving party must 'show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence' during the pendency of the motion." *Id.* at 1269.

The CFTC alleges, without any factual support or citations to the record, that the Court's judgment in favor of Bloom "could disrupt the entire futures market." (CFTC Memo. at 8). For example, the CFTC argues the following, without a single shred of factual evidence to support its claims:

- "The futures market cannot function unless customers and FCMs have immediate access to customer margin funds." (CFTC Memo. at 8).

- "Customers rely upon the collateral they have supplied to support their own trading, and FCMs rely upon customer collateral to support their customers' positions – that is, to meet their obligations to the clearinghouse (or to other, intermediary FCMs) to cover losses arising from such positions." (*Id.* at 8-9).

- The Court's interpretation of Section 4(b) would "immunize" any depository that is not a trading intermediary – "such as a bank" from the segregation requirements applicable to "customer funds" under the CEA. (*Id.* at 9).

- Without immediate access to "customer margin funds" FCMs would be required to cover their customers' margin calls with proprietary funds, and "[w]hen the FCMs are no longer able to support their customers' positions, the clearing houses are left with a deficit that they would pass on to their clearing members and when the members cannot satisfy the deficit the clearing houses default resulting in the inability to offset transactions and bringing the market to a halt." (*Id.* at 10-11).

Notwithstanding the CFTC's overwrought protestations, the sky is not falling.[3] First, there is no *evidence* to support the CFTC's parade of horribles, and second, in making its argument the CFTC again relies on incorrect factual assumptions that the Court already explicitly rejected and/or that the CFTC has elsewhere admitted do not exist.

For example, in ruling on summary judgment, the Court explicitly found "Sentinel did not receive any customer funds under Section 4d(a)(2)." (Opinion at 18; *see also*, *id*. at 14 ("it is undisputed that Sentinel did not engage in futures trading and did

[3] *See* Henny Penny, by Paul Galdone, Clarion Books (1968).

not accept funds to margin, guarantee, or secure any futures trades" (which is the definition of "customer funds")). Indeed, as noted above and as set forth in the Court's written opinion, ***even the CFTC's own expert testified that Sentinel never received any "customer funds" as defined under the CEA***. (Opinion at 17).

Thus, contrary to what the CFTC argues here on its motion for reconsideration, the evidence demonstrates that the funds Sentinel's investor FCMs deposited with BONY were not necessary "to support their customer's positions," "meet their [the FCMs' customers] obligations to the clearinghouse," or "to cover losses arising from such positions." (CFTC Memo. at 8-9). Sentinel's investor FCMs – and not the third-party customers of those investor FCMs – bore the risk and reaped the rewards from the funds they deposited with BONY; those funds were decidedly *not* used to margin, guarantee, or secure futures contracts. Thus, Sentinel never received "customer funds" as defined under the CEA, and there is certainly no valid basis to reconsider the Court's ruling on that point.[4]

B. The Court Correctly Found that Sentinel Did Not Receive Any "Customer Funds" Under Section 4d(b).

The CFTC disputes the Court's interpretation of "customer funds" under Section 4d(b), arguing that the Court's holding implicitly assumes that "customer funds originally received by an FCM can somehow lose their legal character as customer funds if temporarily transferred by the FCM to another person or persons for investment" (CFTC

[4] The CFTC makes no claim that any of the "factual" evidence it asserts – notably absent any citation to the record – is newly discovered or was unknown to it during summary judgment briefing, much less that such evidence could not have been discovered and produced with reasonable diligence. Accordingly, the Court should exclude from consideration all the CFTC's arguments and in Section A.3 of its Memorandum. *Oto*, 224 F.3d at 606.

Memo. at 3-8). First, the CFTC mischaracterizes the Court's holding and assumes something contrary thereto, namely, that the funds Sentinel's FCM investors deposited with BONY met the statutory definition of "customer funds" in the first instance. The Court found, correctly, that they did not.

The Court fully addressed all the arguments the CFTC proffered in its initial summary judgment briefing and repeated (albeit improperly) in its Motion to Reconsider. In fact, the Court explicitly found that Sentinel did not receive "customer funds" under the CEA:

> Customer funds are defined as "all money, securities, and property received by [an FCM] to margin, guarantee, or secure futures contracts." 17 C.F.R. § 1.3(gg)(1). Not surprisingly, the language used to define "customer funds" mirrors the language used in Section 4d(a)(2) to describe the types of funds that must be segregated. As the CFTC's own expert testified, Sentinel never received any customer funds. As discussed above, it is undisputed that Sentinel did not receive any money, securities or property to margin, guarantee, or secure commodities contracts. Therefore, Sentinel did not misappropriate customer funds as proscribed by either Section 4d of the CEA or the corresponding regulations.
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> The CFTC nevertheless argues that Sentinel is liable under Section 4d(b) because its client FCMs' investors received funds used to margin, guarantee, or secure futures contracts, and those funds in turn were transferred to Sentinel for investment. **This argument, however, ignores the undisputed fact that the FCMs did not deposit funds with Sentinel to margin, guarantee, or secure any futures contracts.**

(Opinion at 17-18) (emphasis added).

The CFTC's argument fails at each level. First, the segregation obligations under §4d arise in the context of persons or entities operating as FCMs. Here, as the Court explicitly found, Sentinel was not an FCM under the CEA and did not trade any futures for its FCM investors. (Opinion at 14-15 ("[I]t is undisputed that Sentinel did not engage in futures trading and did not accept funds to margin, guarantee, or secure any futures trades. As Sentinel was not engaging in any futures trading, it was not an FCM as defined by the CEA.").

Then, in laying out the segregation requirement, Subsection 4d(a)(2) [7 U.S.C. §6(d)(2)(a)], specifically refers to the funds required to be segregated as: "all money, securities, and property received by such person [an FCM] to margin, guarantee, or secure the trades or contracts of any customer." Subsection 4d(b) [7 U.S.C. §6d(b)], in turn, adopts the same terminology in that refers to the funds received "as provided in paragraph (a)(2) of this section." Notably, the CFTC regulations specifically define the phrase "all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts" from §4d(a)(2) as *"Customer Funds."* Thus, 17 CFR §1.3(gg) states:

> Customer funds. This term means ***all money, securities, and property received by a futures commission merchant*** or by a clearing organization from, for, or on behalf of, customers or option customers:
>
> (1) In the case of commodity customers, ***to margin, guarantee, or secure contracts for future delivery*** on or subject to the rules of a contract market and all money accruing to such customers as the result of such contracts * * *

17 CFR §1.3(gg) (emphasis added). The term "customer funds" under the CEA, therefore, does *not* mean *any funds* received from a customer for *any purpose*; rather, it is limited, by definition, solely to funds that are "to margin, guarantee or secure" futures contracts. Because Sentinel did not receive any money or property "to margin, guarantee, or secure the trades or contracts of any customer," by definition, it held no "customer

funds." This is exactly what the Court held in ruling on the summary judgment motions – and correctly so. (Opinion at 14-18).

If there were any doubt, the CFTC's expert witness, Dennis Dutterer, confirmed the Court's conclusions. Thus, Dutterer specifically testified that (a) Sentinel never engaged in any futures or options trading (Bloom SOF at ¶52); (b) never engaged in soliciting or accepting orders for the purchase or sale of any commodity for future delivery (*id.*); and, perhaps most significantly on this point, (c) the FCMs that invested with Sentinel were not giving money to Sentinel in order for Sentinel to engage in futures transactions – *i.e.* not "to margin, guarantee, or secure contracts for future delivery." (*Id.*). Thus, after reviewing the definition of "customer funds" in 17 CFR §1.3(gg) and in light of all these undisputed facts he confirmed during his testimony, *Mr. Dutterer admitted that Sentinel never had or received any "customer funds."* (*Id.*; Bloom SOAF at 36). In addition to being factually correct, Mr. Dutterer's testimony on this point constitutes an admission of a party opponent. *Collins*, 621 F.2d at 782 ("[i]n giving his deposition [the expert] was performing the function that [defendant] had employed him to perform. His deposition, therefore, was an admission of [defendant's]" and was admissible as such under Fed.R.Evid. 801(d)(2)); *Dean*, 1996 WL 88861, at *3-*6 (similar); *In re Chicago Flood Litig.*, 1995 WL 437501, at *11 ("A party's pleadings and expert reports often constitute party admissions pursuant to Fed.R.Evid. 801(d)(2). Evidence that plaintiffs or their experts themselves agree with aspects of the [defendant's] case is strongly probative.") (internal citations omitted).

The Court clearly considered the meaning of "customer funds" and reached a correct determination based on the plain text of the relevant statute and CFR. Thus, the

CFTC's arguments fall well short of showing even the hint of an error, much less establishing a "manifest error" – *i.e.*, a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto,* 224 F.3d 601, 606.[5] The CFTC's motion should be denied.

C. The Court Correctly Found That the CFTC Cannot Establish An Alleged Fraud "In Connection With" Futures Contracts.

The CFTC argues that "[l]egislative history, judicial precedent and Commission case law establish that the "in connection with" element of Section 4b … covers conduct much farther removed from the purchase and the sale of futures contracts than occurred here." (CFTC Memo. at 12). In support of its argument, the CFTC relies on broad, largely irrelevant pronouncements from the late 1960's regarding the legislative intent of certain amendments to the CEA, along with cases that either do not support the propositions for which the CFTC cites them, are entirely distinguishable from the facts of this case, or both.

First, the CFTC claims that Secretary of Agriculture George Mehren's statements during his address to House Committee on Agriculture on August 22, 1967 on extending the CEA express the intent to extend the "in connection with" requirement to entities like Sentinel that do not engage in futures trading. (CFTC Memo. at 11, citing Act to Amend the Commodity Exchange Act, Hearings on H.R. 11930, House Comm. on Agriculture, 90th Cong. 1st Sess. 51 (1967)(Statement of Assistant Secretary of Agriculture), reprinted in 113 Cong. Rec. 23651 (Aug. 22, 1967). In fact, Mehren's statement proposes just the opposite. In the quoted section, Mehren advocates expanding §4b to cover rogue

[5] Indeed, the CFTC points to no "controlling precedent" at all, but rather relies on certain isolated comments contained in the legislative history of Section 4d(b) from 1967. Of course, legislative history is not controlling precedent, nor even an expression of the law. *See Matter of Sinclair*, 870 F. 2d 1340, 1344 (7th Cir. 1989).

unregistered entities actively engaging *in futures trading*—precisely the type of activity that Sentinel did *not* engage in. In the middle of the passage quoted by the CFTC, Mehren provides an example of the type of entity and transactions §4b should cover - entities that ***"handle commodity futures trading for others"*** or solicit clients to give "the firm or its president authority ***to make futures trades for them***." This example illustrates precisely why Sentinel's actions were properly deemed *not* to be in connection with futures trades—Sentinel explicitly agreed as a precondition to its existence not to execute futures trades and not to solicit funds or trading authority from individuals for the purpose of futures trading, and Sentinel lived up to this promise. Thus, as this Court repeatedly emphasized, "it is undisputed that Sentinel did not engage in futures trading." (Opinion at 14; *id*. at 12 ("none of Sentinel's investments involved futures contracts"); *id*. at 13 ("Sentinel's alleged misconduct in no way required the purchase or sale of futures commodities. … Although Sentinel's customer FCMs engaged in futures transactions, Sentinel did not.")).

Next, the CFTC cites *R&W Technical Services, Ltd. V. CFTC*, 205 F.3d 165 (5th Cir. 2000) for the proposition that Sentinel's alleged fraud occurred "in connection with" a commodities futures contract as required by §4b of the CEA. However, *R&W Technical Services* involved an administrative enforcement action the CFTC brought against a computer software retailer. The software analyzed real-time futures market data and made buy and sell recommendations to the user. In order to help sell the software, the retailer advertised enormous profits over seven years of trading based on the software's recommendations. However, the so-called profits earned were illusory and only earned on a virtual trading system. The court found that omitting the fact that the gains and losses were virtual, rather than real, "misrepresented the fundamental risk associated with commodity futures investments and trading systems." *Id.* at 172. Indeed, the court found that the software's "only intended use was as a means of selecting commodity futures contracts." *Id.* at 173.

R&W Technical Services has absolutely no application to this case. Unlike Sentinel, the defendant in *R&W Technical Services* sold software specifically for use in *trading commodity futures*. *Id*. Moreover, in stark contrast to the facts of this case, the misrepresentations in *R&W Technical Services* related directly to the purchase or sale of commodity futures. *Id*. Unlike the defendant in *R & W Technical Services*, as the Court noted in its summary judgment ruling, Sentinel did not participate in the commodity futures market. Sentinel was an investment adviser to investment pools that traded securities, not commodity futures. If Sentinel made any misrepresentations, those misrepresentations were allegedly made "in connection with" securities transactions, not futures transactions. Indeed, as the Court well knows, the SEC has a currently pending securities fraud action alleging exactly that. Further, Sentinel never provided any advice nor made any representations whatsoever regarding commodity futures transactions. Therefore, as the Court held, "Sentinel's alleged misconduct in no way required the purchase or sale of futures commodities." (Opinion at 13.)

The CFTC also relies on *Saxe v. E.F. Hutton & Co.*, 789 F.2d 105 (2nd Cir. 1986). *Saxe* undermines, rather than supports, the CFTC's argument. In *Saxe,* the plaintiff liquidated his securities brokerage account to open a commodity futures trading account based on the commodities trader's misrepresentations that the plaintiff would "make a million dollars," among other falsities. The plaintiff alleged both securities fraud and fraud under Section 4b of the CEA. The court in *Saxe* found that the plaintiff failed to state a claim for fraud "in connection with" the purchase or sale of securities because the alleged misrepresentations all related to commodity futures trading. In *Saxe*, the court found that the defendant misrepresented the "degree of risk and highly speculative nature of commodities trading…" *Id.* at 110. In this case, the converse is true: if Sentinel made any misrepresentations at all, those misrepresentations are alleged to have been made in connection with Sentinel's securities trading. As the Court correctly ruled on summary judgment, Sentinel never traded any futures, nor gave any advice on commodity futures markets or investments.

The CFTC next cites *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir. 1977) for the general proposition that the "in connection with" provision of §4b should be broadly construed. That is undisputed. But "broad" construction does not mean "limitless" – a proposition this Court rightly embraced in its summary judgment decision: "Although Sentinel's customer FCMs engaged in futures transactions, Sentinel did not. The connection to futures contracts is too far removed for liability to attach under Section 4b of the CEA." (Opinion at 13). *Hirk*, like the other authority cited by the CFTC, *does* directly involve futures trading – something utterly lacking in this case.

Finally, the CFTC seeks support in the caselaw construing the "in connection with" requirement of Section 10(b) of the Securities Exchange Act, citing *SEC v. Zandford*, 535 U.S. 822-23 (2002), among other cases. But, the Court directly addressed these arguments and specifically addressed *Zandford* in its Opinion:

> The Supreme Court in *Zandford* held that for the "in connection with" requirement to be satisfied under Section 10(b) of the Securities Exchange Act of 1934, a scheme to defraud must coincide with a securities transaction. 533 U.S. at 522. The court explained that "the securities

> sales and respondent's fraudulent practices were not independent events" and determined that the sale of securities were necessary to the execution of the fraudulent scheme. Here, however, the only futures transactions were those independently made by Sentinel's customer FCMs and those FCMs' investors, and Sentinel's alleged misconduct in no way required the purchase or sale of futures commodities. Fraudulent acts which merely involve commodities in some attenuated way do not satisfy the "in connection with" requirement of the CEA. Although Sentinel's customer FCMs engaged in futures transactions, Sentinel did not. The connection to futures contracts is too far removed for liability to attach under Section 4b of the CEA.

(Opinion at 12-13)(internal citations omitted).

Rather than demonstrating "manifest error" or a "wholesale disregard, misapplication, or failure to recognize controlling precedent," the Court's analysis directly addressed cases the CFTC relies on, and fully considered – and then rejected – the CFTC's arguments. Thus, the CFTC's motion for reconsideration should be denied. *Refrigeration Sales Co.*, 605 F.Supp. 6 (finding inappropriate arguments on reconsideration that "contend this Court was in error on the issues it had considered fully and spoken to in detail in the Opinion. Those arguments should of course be directed to the Court of Appeals.") The CFTC points to no other controlling precedent the Court failed to recognize. Instead, the CFTC simply disagrees with the Court's interpretation of those cases and application to the facts of this matter, and such disagreement is not an appropriate ground for alteration or amendment of judgment under Rule 59(e).

D. The CFTC Has Presented No Evidence that Sentinel Engaged in Any Fraud or Mishandled "Customer Funds."

Even if the Court found that Sentinel received "customer funds" under the CEA and that Sentinel's alleged fraudulent activities were "in connection with" futures transactions, bringing Sentinel's conduct within the jurisdiction of the CEA, as a factual matter, the CFTC presented no *evidence* whatsoever that Sentinel violated §4b or §4d(b).

In its Complaint, the CFTC alleged that Sentinel improperly pledged Seg 1 customer securities for the BONY loan on May 21, June 29, July 18, August 7, and August 13, 2007. (Dckt. #1 at ¶26(a)-(e)). The CFTC alleged that "Sentinel's use of segregated securities belonging to the customers of the Seg 1 FCMs as collateral in order to maintain a line of credit with BONY constituted a misappropriation of Seg 1 customer property for Sentinel's own benefit." (Dckt. #1 at ¶27). The factual evidence proffered by the CFTC in support of these allegations is found in its Statement of Facts at ¶52, where the CFTC stated: "On May 21, 2007, June 29, 2007, July 18, 2007, August 7, 2007 and August 13, 2007, Sentinel desegregated hundreds of millions of Seg 1 customer owned assets from segregated accounts and caused them to be transferred into lienable accounts to serve as collateral for its overnight loan with BNY." (Dckt. #147 at ¶52).

In support of its factual assertions in ¶52 that Sentinel commingled and misappropriated customer funds on five days during the summer of 2007 in violation of the CEA, the CFTC relied exclusively on Lisa Marlow's Affidavit and CFTC Exhibit 16.[6] (*Id.*). But as noted above, the Court properly struck both Marlow's Affidavit and CFTC Ex. 16 from the record. (Opinion at 6-8, 9). Accordingly, there is absolutely no admissible evidence the CFTC can point to in support of these allegations. Thus, even if one assumed, *arguendo*, that Sentinel received "customer funds" and that its alleged

[6] The CFTC also cites testimony from Madrigal, Logan, York, and the SEC's expert, Gifford Fong in support of the allegation that Sentinel utilized Seg 1 customer securities to collateralize the BONY loan for Sentinel's benefit. Madrigal's testimony does not relate to the BONY loan at all, but rather relates to Sentinel's dealings with repo counterparties. Logan and York both testified that Seg 1 securities were used to collateralize part of the BONY loan (which Seg 1 had the ability to utilize), but none of the cited testimony even warrants an inference that such hypothecation was improper in any way, much less for Sentinel's benefit. Fong's testimony similarly describes how Sentinel moved securities from the segregated accounts into the clearing/collateral account at BONY. There is no evidence that this was improper in any way or for Sentinel's benefit.

misconduct was "in connection with" futures transactions, there is no way the CFTC can prove that Sentinel improperly hypothecated Seg 1 securities in violation of §4b or §4d(b). Without proof of a primary violation by Sentinel, the CFTC's claims against Bloom as a "control person" fail, by definition.

III. CONCLUSION

For all the reasons set forth above, Defendant Eric Bloom respectfully requests that the Court deny Plaintiff's Rule 59(e) Motion for Reconsideration and to Alter or Amend Judgment.

Dated: May 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

TERENCE H. CAMPBELL, an attorney, certifies that on May 23, 2012, I served **Eric Bloom's Response to Plaintiff's Rule 59(e) Motion For Reconsideration and to Alter or Amend Judgment** by filing the foregoing with the Clerk of Court using the CM/ECF system which will send notification and a copy of such filing to all parties.

/s/ Terence H. Campbell
Terence H. Campbell
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